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IN THE  
**Supreme Court of the United States**  
October Term, 1983

UNITED STATES OF AMERICA,

*Plaintiff,*

*v.*

STATE OF MAINE, *et al.*  
(RHODE ISLAND, NEW YORK),

*Defendants.*

**EXCEPTIONS AND BRIEF OF THE  
STATE OF NEW YORK**

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**EXCEPTIONS AND BRIEF OF THE  
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**Introduction**

The issue to be decided in this Supreme Court original jurisdiction special proceeding is the location of the legal coastline of the United States in the area of the eastern end of Long Island Sound and in Block Island Sound. The determination of the issues are significant to New York because it will affect the location of New York's coastline and the State's jurisdiction over waters in Block Island Sound. A resolution of the area of jurisdiction will also affect the imposition and enforcement of certain of New York's fishing laws and pilotage law in Block Island Sound.

This supplemental proceeding arose out of the decision by the United States District Court in *Warner v. Replinger*, 397 F. Supp. 350 (D.R.I. 1975) and the subsequent affirmance by the First Circuit in *Warner v. Dunlap*, 532 F.2d 767 (1st Cir. 1976). In *Warner*, several plaintiffs who were licensed by Connecticut as pilots of foreign flag and American registry vessels challenged the Rhode Island statute which required that foreign vessels and American vessels, under registry for foreign trade, that transverse the waters of Block Island Sound have a pilot licensed by the Rhode Island Pilotage Commission. In rejecting the plaintiffs' claim, both courts found that Long Island Sound and Block Island Sound was a bay in accordance with the requirements of the Convention on the Territorial Sea and Contiguous Zone, 15 U.S.T. 1607, T.I.A.S. 5639 (hereinafter "Convention"). Since the courts determined that Block Island Sound was a bay, they concluded that the Rhode Island statute was valid pursuant to 46 U.S.C. § 211, which authorizes states to regulate pilotage "in bays, inlets, rivers, harbors, and ports of the United States. . . ."

A petition for a writ of certiorari was filed in the *Warner* case and is still pending. However, the United States urged that because a final decision as to the nature of Block Island Sound would determine the coastline in that area, the proper proceeding for determination of the "bay" issue should be in *United States v. Maine, et al.*, No. 35 original, the proceeding which established the coastline and the territorial sea of the states on the eastern seaboard.<sup>1</sup> This

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1. The legal coastline (also referred to as the baseline) is the measuring point for the territorial sea. The United States recognizes a three mile territorial sea. Pursuant to the Submerged Lands Act, 43 U.S.C. §§ 1301-1315, the three mile territorial sea comes under the jurisdiction of the coastal state.

Court agreed to the United States request and this supplemental proceeding was instituted. United States Senior District Court Judge Walter E. Hoffman was appointed Special Master on June 29, 1977.

The State of New York did not participate in the early stages of the supplemental proceeding, but subsequently did so after further consideration of the issues and their potential impact upon the State's interest. New York participated in the evidentiary hearings in Rhode Island and Norfolk, and offered testimony of two expert witnesses and the deposition of a third witness.

The Master issued his Report on January 13, 1984. He concluded that Long Island Sound and part of Block Island Sound west of a line between Montauk Point on Long Island and Watch Hill Point, Rhode Island is a juridical bay under the terms of Article 7 of the Convention. He further concluded that pursuant to the Convention this juridical bay should be closed by a baseline running from Montauk Point on Long Island north to Watch Hill Point, Rhode Island.

### **Exceptions**

The State of New York excepts to the following findings and conclusions in the Master Report:

1. The waters east of a line between Montauk Point and Watch Hill Point are not landlocked (Master's Report, p. 59).

2. Watch Hill Point is the first prominent point on the Rhode Island Coast and marks the separation between the waters within the indentation and the waters outside the indentation (Master's Report, p. 59).



3. If the closing line included Block Island, there would be waters inside the closing line which are not landlocked (Master's Report, p. 60).

4. The natural entrance point to the indentation constituted by Long Island Sound and Block Island Sound is along the Montauk Point to Watch Hill Point line (Master's Report, p. 60).

5. Block Island does not form the mouth to the bay to the west or cause the bay to have multiple mouths (Master's Report, p. 60).

6. Block Island is too far seaward of any mainland-to-mainland closing line to consider altering the closing line to include Block Island (Master's Report, p. 60).

7. The legal coastline in the disputed area includes a closing line between Watch Hill Point, Rhode Island and Montauk Point on Long Island (Master's Report, p. 61).

### **Summary of Argument**

The Master correctly concluded that Long Island Sound is a juridical bay pursuant to the provisions of Article 7 of the Convention. New York, however, contends that the facts, the terms of the Convention, and the legal interpretation of the Convention establish that the juridical bay should include all of the waters of Block Island Sound.

The waters of Block Island Sound meet the traditional purposes of a bay under international law, as well as the requirements for a juridical bay set forth in Article 7. The

waters are protected and landlocked and are not factually or legally different from the waters in Long Island Sound. The geographic features and the location of Block Island causes this juridical bay to have one primary entrance.

The closing line proposed by the Master between Montauk Point and Watch Hill Point is an arbitrary line which in fact and in law does not separate bay waters from sea waters or correctly close the area of the bay. The proper base closing line, in accordance with the requirements of Article 7 of the Convention (paragraphs 3 and 4), should be drawn from Montauk Point, Long Island to Block Island and Point Judith, Rhode Island to Block Island.

### **Article 7 of the Convention on the Territorial Sea and Contiguous Zone**

1. This article relates only to bays the coasts of which belong to a single State.

2. For the purposes of these articles, a bay is a well-marked indentation whose penetration is in such proportion to the width of its mouth as to contain landlocked waters and constitute more than a mere curvature of the coast. An indentation shall not, however, be regarded as a bay unless its area is as large as, or larger than, that of the semi-circle whose diameter is a line drawn across the mouth of that indentation.

3. For the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water marks of its natural entrance points. Where, because of



the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths. Islands within an indentation shall be included as if they were part of the water area of the indentation.

4. If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.

5. Where the distance between the low-water marks of the natural entrance points of a bay exceeds twenty-four miles a straight baseline of twenty-four miles shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length.

6. The foregoing provisions shall not apply to so-called "historic" bays, or in any case where the straight baseline system provided for in article 4 is applied.

## ARGUMENT

**Pursuant to the Terms of Article 7 of the Convention, the Juridical Bay Constituted by Long Island Sound Should Include Block Island Sound, and Be Closed by Base Lines from Montauk Point and Point Judith to Block Island.**

As recognized by the Master and all of the parties, a determination of the issue here rests upon the proper application of Article 7 of the Convention. As in other coastal disputes, the Court is called upon to apply international law

as well as Federal law to this domestic controversy. As stated by this Court in *United States v. Louisiana*, 394 U.S. 11, 77 (1969), concerning the historic bay principal under the Convention, "the only fair way" to apply the Convention is to consider the opposing claims as if they were being made between equally sovereign nations.<sup>2</sup>

### **The Juridical Bay**

In applying the Article 7 criteria to Long Island Sound the Master correctly determined that Long Island Sound is a juridical bay. In making this determination he recognized the obvious geographic features of the area and Long Island's relationship to the mainland, and applied the provision of the Convention in accordance with the decisions of this Court. The Master, however, was in error in his application of the Article 7 criteria to the eastern part of Block Island Sound and Block Island and the relationship of that area to the juridical bay which he found to be present.

As noted by the Master, Article 7 sets forth three criteria for determining the existence of a bay: (1) a well-marked indentation constituting more than a mere curvature of the coast; (2) the area of the indentation must be "as large as, or larger than, that of a semi-circle whose diameter is a line drawn across the mouth of that indentation"; (3) the waters must be landlocked. These three criteria were found by the Master to be applicable to the

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2. In applying the Convention, this Court has shown deference to the United States in only one respect, and that involved a purely policy choice not to draw straight base lines pursuant to Article 4 of the Convention, an issue which is not present here. *United States v. Louisiana*, 394 U.S. at 72; *United States v. California*, 381 U.S. 139, 168 (1965).

waters in Long Island Sound and Block Island Sound west of a line between Montauk Point on Long Island and Watch Hill Point, Rhode Island, but not to the rest of Block Island Sound. Contrary to the Master's analysis and conclusion, however, each of the three criteria also apply to the portion of Block Island Sound east of the Montauk to Watch Hill line.

### **1. The Indentation**

The first and most obvious way of determining the existence of an indentation is to examine the area as represented on a nautical chart (see: Appendix B, Master's Report; N.Y. Exhibit 10). An examination of such a chart will show a very pronounced and deep indentation beginning at approximately Throgs Neck at the western end of Long Island Sound. This indentation clearly extends east to Montauk Point as the obvious entrance point on the southernmost side of the bay. On the northside, because of the location of Block Island, one may also ascertain that there is a primary entrance to the indentation between Block Island and Point Judith, Rhode Island, which would place the northernmost entrance point at Point Judith. There is also a secondary entrance to the bay between Montauk Point and Block Island.

The nautical charts show the shallow depth and underwater obstacles between Montauk Point and Lewis Point on Block Island. Rhode Island's witness, an experienced professional pilot, Captain John Neary, testified that this underwater line would have an effect on the sea in storm conditions and "knock down the swell." Neary, November 13, 1981, pp. C-109, 119. He also noted that the chart indicates that the seas break in heavy weather at Southwest

Ledge. Neary, November 13, 1981, p. C-119; U.S. Exhibit M-1.

Professor Jean Gottmann, Professor of Geography at the University of Oxford in England, noted the lesser depths, rocks and boulders lying between Montauk Point and Block Island which he considered a linking under the sea and evidence of Block Island being a part of the same terminal moraine which formed Long Island. Gottmann, January 11, 1982, pp. 47-49.<sup>3</sup> Because of the difficulty imposed on navigation in the area between Montauk Point and Block Island, commercial ships use the entrance to Block Island Sound which lies between Block Island and Point Judith. Neary, November 13, 1981, p. C-92.

The Master's conclusion (Report p. 59) that the Baseline Committee was correct in finding Watch Hill Point as the first prominent point on the Rhode Island coast overlooks the fact that the prominent point which should be considered is that which is located in the area of the natural entrance, in this case Point Judith.<sup>4</sup> The Master's further conclu-

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3. Professor Gottman testified that,

"Block Island, in obvious fashion, belongs to the same system of deposits brought by the ice sheets from the continent. There was a linkage between Montauk Point, or the easternmost peninsula—if I may again show on the map with my stick—between Montauk Point here and Block Island that can be easily observed from the depths along the line that one can trace from Montauk Point to about Lewis Point on Block Island." Gottman, January 11, 1982, p. 47.

4. The Baseline Committee was a creation of the Federal Government to establish the location of the coastline in the first instance. This determination by "mid-level bureaucrats" (testimony of United States Witness Hugh J. Dolan, November 9, 1981, p. 70) who served

*(footnote continued on next page)*

sion that Watch Hill "marks the separation between the waters within the indentation and the waters outside the indentation" is not supported by the evidence. The evidence shows that the waters of Block Island Sound are sheltered by Block Island and the underwater obstructions, and that an artificial line between Montauk Point and Watch Hill Point would not in reality divide waters having the characteristic of a bay from those having the characteristic of open seas.<sup>5</sup>

The Master, in viewing Block Island Sound, failed to observe the concept in international law which permits the closing of a bay. That concept, which is undisputed in the record, holds that a bay may be closed because the waters are closely related to the mainland and that travel through these internal waters is not necessary for international passage. Professor Myers S. McDougal, January 11, 1982, pp. 41, 46; Professor Derek W. Bowett, November 11, 1981,

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on the Committee is only entitled to the evidentiary weight given to opinions offered on behalf of any interested party.

A contrary opinion was offered by Commander White,

"... Point Judith is a reasonably well-pronounced point in relation to the line of the coast from Watch Hill coming out to Point Judith and then returning towards Narragansett Bay and the coast generally going along, a sort of front of those islands. I consider it myself to be quite a well pronounced point." White, November 11, 1981, p. B-69.

5. Captain Neary testified that in his opinion "Long Island Sound, Fishers Island Sound, Block Island Sound, Gardiners Bay are all one body of water." Neary, November 13, 1981, C-117.

Captain Neary also testified to the shelter that Block Island would provide depending upon the direction of the wind. Neary, November 13, 1981, C-109, C-119-121.

See also testimony of Captain Neary relating to the effect of the underwater obstructions between Montauk Point and Block Island previously referred to at p. 8 of our brief.



pp. 72-73; see also McDougal "*The Public Order of the Oceans*", pp. 341-349.<sup>6</sup>

The Master found that the evidence of the states' jurisdiction over Block Island Sound was insufficient to support an historic claim. In doing so, he failed to recognize that the evidence of jurisdiction which he rejected does establish that these waters fulfill the international purpose of a

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6. Professor McDougal, Sterling Professor of Law Emeritus at Yale Law School and Visiting Distinguished Professor of Law at New York Law School, testified that "It has always been the law that a state may control the access to its internal waters. States don't have to open their harbors, don't have to open their ports. In the inland waters the State can bar, can preclude this transport from external sources." McDougal, January 12, 1982, p. 42.

Professor McDougal also referred to language in the *North Atlantic Fisheries Arbitration* (Scott, *The Hague Law Reports*, Volume IV, p. 141) decided in 1911 as an example of the concept of bays in international law,

"[T]he geographical character of a bay contains conditions which concern the interests of the territorial sovereign to a more intimate and important extent than do those connected with the open coast. Thus conditions of national and territorial integrity, of defense, of commerce and of industry are all vitally concerned with the control of the bays penetrating the national coastline." McDougal, January 12, 1982, p. 45.

Professor McDougal also pointed out that the framers of the Convention were of course familiar with the concept of bays under international law ;

"[T]he people who framed this 1958 Convention knew this history, and what they were trying to do was to give the coastal state enough authority and enough control over these closely proximate water to protect itself, to serve its internal interests at the same time without any great impairment of the ocean freedoms." January 12, 1982, p. 46.

The United States witness, Professor Bowett, testified that,

"[T]he original justification for treating a bay or internal waters was that vessels navigating along the coast need not enter into those waters, they would navigate as it were beyond the mouth of the bay and it was that that provided the justification for the coastal state treating the bay as internal waters." Bowett, November 11, 1981, pp. 72-73.



bay. The evidence established that the waters of Block Island Sound have one of the prime characteristics of a bay in that they do not constitute a route of international passage. Neary, Nov. 13, 1981 at C-88-91; Master's Report, pp. 46-47. In addition, these waters are closely related to the mainland by the intensity of their use for fishing, "sports" boating and the passage of commercial boats. Gottmann, January 12, 1982, pp. 50, 91; see also McDougal, January 12, 1982, pp. 46-47.

The evidence further demonstrated: (1) that New York and Rhode Island have laws requiring licensed pilots to be used by foreign vessels and American vessels involved in foreign trade in transiting Block Island. (New York *Navigation Law* § 89-b; R.I. Gen. Laws § 46-9.1-1. *et seq.*); (2) that Congress recognized and approved the boundary between New York and Rhode Island in Block Island Sound. H.R.J. Res. 138, 58 Stat 672 (1944); and, (3) that New York regulates fishing in its portion of Block Island Sound. Christ, Jan. 25, 1982 (Deposition). It is, therefore, clear from the evidence that the purposes and characteristics of a bay which are found in Long Island Sound are also present in Block Island Sound.

## 2. The Semi-Circle Test

The semi-circle test requires that the water area of a bay exceed the area of a semi-circle whose diameter is equal to the distance across the mouth of the bay. The parties have stipulated that the distance between Montauk Point and a point southwest of Southwest Point on Block Island is 13.8 nautical miles and that the distance between Point Judith, Rhode Island to Sandy Point, Block Island is 8.3

nautical miles. Attachment II, p. 67, Master's Report. It is obvious from viewing any nautical chart showing Long Island Sound and Block Island Sound that because of the vast amount of water contained therein, any closing line of 24 nautical miles or under would easily satisfy the semi-circle test of Article 7, and the Master so found. Master's Report, p. 49.

### **3. Landlocked**

The Master concluded that the waters east of a line between Montauk Point and Watch Hill Point are not landlocked. Master's Report, p. 59. The Master's conclusion was made in the face of clear evidence to the contrary, including an objective test which he rejected without giving any reason for doing so. Master's Report p. 56 n. 42.

The objective test for landlockedness was set forth in the testimony of Rhode Island's witness, Jeremy C.E. White, Hydrographic Officer of the Port of London Authority, who as a Commander in the Royal Navy had actual experience in delimitation of territorial seas on nautical charts. White, Nov. 12, 1981, pp. 133-4. White's test for determining when a body of water is landlocked is based upon the observation that at any point a ship first crosses the entrance to a bay a minimum of 180° of land will be visible if one were to look in every direction. White thus concluded that landlocked waters require that any point on such waters be able to satisfy the minimal 180° of visible land. He applied this test to Block Island Sound and found the waters to be in fact landlocked. White, Nov. 12, 1981, pp. B-8, 13; RI Ex. 1(d)(e)(f).

The significance of White's analysis is not that it is his test, but that: (1) the minimum of 180° of visible land is a reasonable criteria; and (2) this criteria can be mathematically measured with respect to any point within a bay.

One of the characteristics of landlocked waters is that they provide shelter and isolation from the sea. Robert Hodgson and Lewis Alexander, *Towards an Objective Analysis of Special Circumstances*, Occasional Paper No. 13, U.S. Ex. 40 at p. 8. As we have previously noted the evidence at the trial demonstrated that Block Island and the obstacles and obstructions underwater between Montauk Point and Block Island dissipate the storm effects of the open sea located outside of Block Island Sound. Neary, Nov. 13, 1981, pp. C-109, 119; see also testimony that Block Island and obstacles affect the tide. Swanson, Nov. 11, 1981, p. 3-128, 9.

The shape of this juridical bay is not that of the more commonly visualized bay having arms of approximately the same length. For this reason the Master failed to appreciate that the arm to the north, the Rhode Island coast, provides closure and protection to the waters of Block Island Sound, and that Block Island provides the necessary additional closure and protection sufficient for these waters to be considered landlocked.

#### **The Closing Lines for the Juridical Bay**

Since the facts demonstrate that the juridical bay encompasses the waters of Block Island Sound and that the primary entrance lies between Block Island and Point Judith, the Master should have utilized Block Island in

closing the bay pursuant to the applicable language in paragraphs 3 and 4 of Article 7. Paragraph 3 states in part:

“Where, because of the presence of islands, an indentation has more than one mouth, the semi-circle shall be drawn on a line as long as the sum total of the lengths of the lines across the different mouths.”

and paragraph 4 states:

“If the distance between the low-water marks of the natural entrance points of a bay does not exceed twenty-four miles, a closing line may be drawn between these two low-water marks, and the waters enclosed thereby shall be considered as internal waters.”

It is obvious from viewing the area that the most southern entrance point for the bay should be located at Montauk Point. As we have previously shown, the indentation extends to the area between Block Island and Point Judith. Thus the most northern entrance point should be located at Point Judith, which is also a prominent point on the Rhode Island coast and marks the entrance to Narragansett Bay.

Although a straight line from Montauk Point to Point Judith would also close the bay,<sup>7</sup> the proper closing lines under the Convention, as well as the more logical ones,

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7. The parties have stipulated that the distance between Montauk Point and Point Judith exceeds 24 miles by 2 to 3 tenths of a mile, but that the distance from Montauk Point to Point Judith harbor works is under 24 miles. Attachment II, p. 67, Master's Report. The United States' own witness Robert Smith testified that harbor works can be used as a headland for a bay. Smith, Nov. 10, 1981 at 130; see also Article 8 of the Convention and Gottman, Jan. 12, 1982, 55, 69-70. Although such a line would not conform to the 45° angle, this is not relevant for three reasons: 1) the 45° rule is not imposed by the Convention; 2) the 45° rule is not applicable because Point Judith is not a point on a featureless coast but a prominent point; 3) the 45° rule is not applicable because the proper closing line utilizes Block Island and not Montauk Point to Point Judith.

would utilize Block Island.<sup>8</sup> Article 7(3) of the Convention permits a closing line to be drawn to an island “where because of the presence of islands, an indentation has more than one mouth.” Here, as we have shown, Block Island causes the indentation to have more than one mouth so that the closing lines should be drawn to Block Island.

Block Island also causes the bay to be more landlocked than it would otherwise be. The Commentary of the International Law Commission states with regard to Article 7(3) that, “the presence of islands at the mouth of an indentation tends to link it more closely to the mainland.” Report of the International Law Commission Covering the Work of the Eighth Session (1956) 2 Y.B. Int’l L. Comm’n 269 U.N. Doc. A/CN.4 (1956). As we have pointed out previously, the fishing and boating activities in Block Island Sound indeed relate to the mainland.

The United States has argued in this proceeding that in order for an island to be utilized in drawing closing lines it must be intersected by a line which is drawn between the mainland headlands of the bay.<sup>9</sup> There is no such requirement, either implicit or explicit, in Article 7, as noted by this Court in *United States v. Louisiana*, 394 U.S. at 59 n. 79,<sup>10</sup> and we would suggest that the implication in Article 7(5) is to the contrary.

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8. The parties have stipulated that the distance between Montauk Point and a point southwest of Southwest Point on Block Island is 13.8 nautical miles and the distance from Point Judith to Sandy Point on Block Island is 8.3 nautical miles. Attachment II, Master’s Report, p. 67.

9. A line from Montauk Point to Point Judith Harbor works would pass to the west of Block Island.

10. “. . . Article 7(3) contains no requirement that the islands be intersected by a mainland-to-mainland closing line.” *id.* n. 79 at p. 59.



One of the leading authorities recognized by this Court<sup>11</sup> in the area of coastline determination, Aaron Shalowitz, states in his book 1 *Shore and Sea Boundaries* (1962) at 225 that a reasonable interpretation of the Convention is that closing lines should be drawn to a seaward island. Shalowitz points out that,

“The Basis for this interpretation is the observation of the ILC that the presence of islands at the mouth of an indentation tends to link it more closely to the mainland . . . It would seem to follow that where a choice of lines exists that line be selected that encloses the greatest area of inland waters. This is consistent with Art. 7, par. 5 of the convention which calls for a closing line to be drawn that encloses the maximum area of water possible, and with par. 3 of the article which allows islands within an indentation to be considered part of the water area.” *id.* at 225 n. 38.

The distance seaward an island may lie from a straight line across the entrance in order to be utilized for closing purposes is of course limited by two criteria in the Convention: (1) landlockedness, and (2) the maximum total length of 24 miles permitted for closing lines. Application of these two criteria to a seaward island will determine whether or not it may be utilized for the closing of a bay. These criteria insure compliance with the drafters' intent and preserve the integrity of the Convention provisions. Use of a seaward island is also, of course, consistent with paragraph 5 of Article 7, which indicates the intent, as pointed out above, to “enclose the maximum amount of water that is possible.”

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11. *United States v. Louisiana*, 394 U.S. at 57 n. 78.



In accordance with the terms of the Convention, Block Island should be utilized in drawing base closing lines for the juridical bay. Pursuant to the evidence, the lines should be drawn from Montauk Point to a point near Southwest Point on Block Island and Sandy Point on Block Island to Point Judith. White, November 12, 1981, p. B-73.

### Conclusion

For the reasons set forth above, all of Block Island Sound constitutes a part of the Long Island Sound juridical bay, and the proper closing lines and base point for the territorial sea in the area at issue are a line from Montauk Point to a point near Southwest Point on Block Island and Sandy Point on Block Island to Point Judith.

Dated: New York, New York  
May 4, 1984

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